United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2533

To be argued by
HARRY C. BATCHELDER, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2533

UNITED STATES OF AMERICA,
Appellee,

—v.—

JOVANNA GUARDI,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
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Preliminary Statement

Jovanna Guardi appeals from a judgment of conviction entered on November 8, 1974 in the United States District Court for the Southern District of New York after a two day trial before the Honorable Edward Weinfeld, United States District Judge, and a jury.

Indictment 74 Cr. 533, filed May 24, 1974, charged Jovanna Guardi and J. C. Easterling in Count One with distributing 31.96 grams of cocaine hydrochloride and charged Jovanna Guardi in Count Two with distributing 30.06 grams of cocaine. Title 21, United States Code, Sections 812, 841(A)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2.

On October 2, 1974, Guardi's* trial commenced, and she was convicted on both counts the next day.

On November 8, 1974, Guardi was sentenced to concurrent terms of imprisonment for one year, with a three year term of special parole to follow. Guardi is free on bail pending appeal.

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* J. C. Easterling, the co-defendant, is a fugitive.

Statement of Facts

The Government's Case

On August 23, 1973, at about 8:15 P.M. Detective Ernest Mahone was introduced by Marion Ladd, also known as Marion Greenberg, an informant, to defendant Jovanna Guardi at the Tatler's Bar at 141 East 57th Street. (22-23, 40).* During the ensuing conversation over drinks, Detective Mahone asked if he could purchase an ounce of cocaine from Guardi, who asked whether Mahone wanted "street stuff or stuff which could be cut." (23).

Soon thereafter Guardi excused herself and, observed by Mahone and Detective Murphy, Guardi had a conversation at the back of the bar with J.C. Easterling. (23, 39-40). Murphy observed Guardi take her handbag from near the cash register, remove a brown manilla envelope and hand it to J. C. Easterling, who then made a phone call and went upstairs (23, 40). After the conversation with Easterling, Guardi returned to Mahone and stated she had an ounce of cocaine for $800 (23).

Guardi then went upstairs and soon thereafter called for Mahone and the informant to join her (23, 41). She then introduced Mahone to J. C. Easterling and handed Mahone a blue and white envelope (24).** Mahone attempted to give Guardi $800 but she refused it, telling him to follow her to the bathroom, where she accepted the money and counted it out (24-5). Guardi informed Mahone that the cocaine she had given him would take a "two cut" and that if Mahone wanted to purchase more cocaine he could secure it from her if he came to the bar the day be-

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* This meeting was also observed and described by Detective William Murphy (38-41).

The numbers cited in parenthesis are to the trial transcript.

** The substance purchased was analyzed to be 31.96 grams of cocaine hydrochloride.

fore he wanted delivery (25). Mahone and the informant left the bar soon thereafter (25, 41-2).

On September 10, 1973, Detective Mahone called the Tatler's Bar and spoke with an unidentified man, who said that Guardi was not at the bar (29). Mahone asked the man to tell Guardi that Ernie had called and that Mahone would be coming to the bar the next day at approximately 7:00 P.M. (29). Mahone added that it was important for Guardi to receive this message, and the man said he would try and get the message to her (29).

On September 11, 1973 at about 7:15 P.M. Detective Mahone went to the Tatler's Bar and met Guardi (29, 30, 44). Guardi informed Mahone she had an ounce of cocaine for $850 instead of $800 (30). Mahone said he only had $800, and Guardi replied that Mahone could give the extra $50 to Marion Ladd (30). Guardi removed a plastic bag from her bosom, and Detective Mahone gave her $800. In the ensuing conversation Guardi indicated this cocaine * should be cut with lactose and would take a "one cut". (30).

On cross examination Detective Mahone testified that Guardi never had any conversation with him as to his status as a police officer (36).

The Defense Case

The defense called Marion Greenberg, the informant, who testified she had been living with Frank Stewart prior to his incarceration and that he was presently awaiting trial on a narcotics case in the United States District Court for the Southern District of New York (75, 77). Greenberg also testified she was in federal protective cus-

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* A chemist testified that the substance purchased on that date was 30.06 grams of cocaine hydrochloride cut with lactose (GX 2; 72).

tody because of threats made on her life and that she became an informer when her son became a possible accessory to extortion charges in New Jersey (77-80, 84-6, 111). Greenberg first met Guardi in 1971, when Guardi was a barmaid at the Tatler's Bar (88).

Greenberg denied soliciting sexually or threatening Guardi and denied ever owning a gun or threatening Guardi with one (88-89). Greenberg also denied ever trying to get Guardi to sell drugs for her and stated her first drug-related conversation with Guardi was when she called Guardi up and asked her to sell the first ounce of cocaine later bought by Mahone (89-90). The first meeting between Guardi and Mahone took place soon thereafter (89-90). Greenberg denied both fixing the price for the cocaine and delivering it to the Tatler Bar the day before Mahone's initial purchase. She also disclaimed any knowledge of the events of September 11, 1973 (91).

The defense next called the defendant, who testified she was 32 years old and had been a barmaid for twelve years (112). She first met Marion Greenberg while she was working at a bar called Woody's and said that Greenberg agreed to assist in recovering her stolen property (113-4). Greenberg subsequently invited her for dinner, which she refused. Guardi stated that she got transferred to the Tatler's Bar because Greenberg had two of her female friends attempt to assault her in the bathroom at Woody's. (114-5). Guardi testified that Greenberg made lesbian overtures to her and propositioned her for prostitution and the "con game" (115-6). Guardi claimed that Greenberg used to have men follow her home, had a man throw a drink at her and threaten to cut her up, and coerced her into selling drugs (117-8). Guardi claimed that threats were made every day on the phone by Marion Greenberg and that Greenberg had said that if she did not do what was required, lye would be thrown in her face (119).

As to the events of August 23, 1973 Guardi stated that on the previous day Greenberg came to the bar and gave her an envelope containing cocaine for delivery to a friend of Greenberg's (119-120). They both hid it in the bottom of a bar upstairs at the Tatler (120). On August 23, 1973 Greenberg came to bar with Detective Mahone. Guardi went upstairs, taking Easterling with her for protection, and made the delivery to Mahone (120-1). Greenberg told her that, if she were asked, she should say that the cocaine would take a "two cut" and she repeated this to Mahone even though she didn't know what "one or two cut" meant (121).

Nothing further happened along these lines until early September, when a customer threw a drink in her face and told her she would have to do as "Marsha" ordered. Greenberg called her soon thereafter, saying that Detective Mahone would show up one more time and that Greenberg would give her another envelope for which she should ask $850 (122). Guardi met Detective Mahone on September 11, 1973 and gave him an envelope; she asked him if he was a cop, which he denied (122). Mahone paid her $800, and she told him to give the $50, which Mahone still owed, to Greenberg (123). The $800 paid by Mahone was given to Greenberg the following day (123).

She had no further contact with Greenberg after Thanksgiving of 1973, nor did Greenberg make any further threats against her (123-4).

On cross-examination Guardi admitted that although she only worked part-time at the Tatler, she rented a $400 a month apartment (127-8, 133-6). She stated that she had never told anyone, including friends or the police, of the threats that were made against her by Greenberg (123-132). She denied knowing what she was transferring was cocaine and claimed that she never saw envelopes in which cocaine was wrapped (132-3). Guardi confirmed her dealings with Detective Mahone on August 23, 1973 and September 11, 1973 and confirmed the fact that on the second

occasion she told Mahone she "guessed" the cocaine could be cut with lactose, even though she had no knowledge of the use of lactose (136-142).

Government Rebuttal

Detective Gerald Lino testified—contrary to Ms. Guardi's testimony that she had no contact with Marion Greenberg after September 11, 1973—that on May 16, 1974, when he was with Marion Greenberg at the Call Back Bar, he met and talked with Guardi, who told him that she had the best stuff in town and that "one blow would knock you on your ass" (158).

ARGUMENT

Judge Weinfeld properly refused to allow Guardi to impeach Greenberg, a defense witness, with her prior criminal record.

The only claim raised on appeal is that Judge Weinfeld improperly refused to permit defense counsel to impeach the informant, Marian Greenberg, whom the defense had called as a witness, with her prior criminal record. Judge Weinfeld's decision was clearly within his discretion.

On the morning of trial, defense counsel asked for the first time that the Government produce the informant, who was in protective custody near Washington, D.C., and the informant's "yellow sheet". The Government agreed (2). In his opening, defense counsel stated that "I suppose I will call" the informant, if the Government did not. He also said to the jury that

> "You will find out that the informer has a vast record for various criminal activities dating back to at least 1951 and who, in her own way, is somewhat of an expert as a con artist and a con woman and who has done much time in penitentiary for these activities." (14)

Counsel added that the informant had made lesbian advances which Guardi had rejected and that the informant had "difficulties" with the man with whom she was living in sin (15-16). The balance of his opening related to the contention that the crimes concededly committed by Guardi had resulted from threats of bodily harm and other machinations directed against Guardi by the informant.

At the conclusion of the first day of trial, defense counsel repeated that he wanted "Marsha's [the informant's] yellow sheet, which is very extensive . . ." (57a)

Trial resumed the next morning with defense counsel complaining that the "yellow sheet" (New York City Police Department fingerprint record) which the Government had furnished lacked the disposition of certain arrests.* The Judge pointed out that defense counsel could not ask the witness about arrests. He also asked defense counsel whether he knew what the informant's testimony would be and counsel responded that he had received copies of her testimony.** Counsel conceded that he had not spoken with the informant, and Judge Weinfeld said that he would give defense counsel a chance to interview her out of the presence of any Government official or agent. Judge Weinfeld added that if the informant were called by Guardi but did not testify as defense counsel asserted she should, he would not allow defense counsel to impeach her testimony with her 20-year-old criminal record. The Court again offered defense counsel an opportunity to talk privately to the informant, but the offer was declined. The colloquy concluded with the trial judge's statement that he would rule on the question of impeaching the informant,

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* All but one of these arrests was no more recent than the late 1950s.

** The testimony referred to was Greenberg's grand jury testimony (62).

if she were called, after her substantive testimony had been heard (58-68).

Thereafter, Guardi called Greenberg as a defense witness. Direct examination included, in this order, inquiry about Greenberg's use of aliases, her illicit relationship with Frank Stewart and her illegitimate son, Stewart's present incarceration on a seven to ten year narcotics sentence and the pendency of another charge against him for narcotics, Greenberg's status in protective custody, her contacts with federal agents, her acting as an informant, when it was she had been given her "number as an agent", her giving a party to raise legal fees for Stewart, her recruitment as an informant as a result of the arrest of her son in connection with narcotics, and whether she had been convicted of a crime (74-86). To the last question, the Court sustained an objection "at this time". Defense counsel then demanded, in the presence of the jury, that Greenberg be declared as a hostile witness, and the Court refused (87).

Defense counsel then inquired whether Greenberg had solicited "my client for sexual activities with yourself or other people", and whether Greenberg had threatened Guardi with a gun, both of which Greenberg denied (88-89). He then asked thirteen questions about the two narcotics sales charged against Guardi, eliciting Greenberg's testimony that she had had nothing to do with the second one and that her involvement in the first had been to ask Guardi to sell some cocaine to a friend (90-92). Defense counsel then moved on to how many people Greenberg had "set up",* what benefits had been promised by the agents for Stewart and her son if she "kept producing people for them", more about her illicit relationship with Stewart, the

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* Greenberg admitted introducing seventeen people to narcotics agents over a two year period for the purpose of arranging narcotics sales to the agents (92-93).

fact that Greenberg had introduced Stewart to an agent several months before she began living with him, whether Greenberg had threatened Guardi with lye and mutilation, whether Greenberg had ever been "sexually interested" in Guardi, and how much money Greenberg had "tricked people out of during your lifetime"* (92-97). Counsel then demanded, again in the presence of the jury despite an earlier admonition by the Court, that Greenberg be declared a hostile witness; the application was denied (98). There followed a bench conference, at which counsel insisted that he be allowed to impeach Greenberg with her prior convictions.

Judge Weinfeld initially refused:

> "It has been evidenced to me that you knew from the start that this witness would not substantiate or corroborate in the slightest way what you told the jury yesterday and that you deliberately called her aware of this in order to be able to get before this jury the fact that this person had a prior record.
>
> This is a tactic I have rarely seen and it is a dust-throwing tactic and I sustain the objection, and let us go on and there will be no further discussion about it." (100).

The Judge also held that the prior convictions on which defense counsel wished to examine the witness were too old (101). The Court did permit defense counsel to ask whether Greenberg had been convicted of a crime, and she admitted that she had (102). After some more questions about the nature of Greenberg's protective custody status and her activities as an informant, defense counsel made another side-bar plea to bring out Greenberg's ". . . . criminal record where I know of years she has spent in jail, of lesbian activities that occurred in women's prisons that

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*Greenberg admitted tricking people out of "a lot more money than $60,000" (97).

she was in" (107-108). When this was denied, the examination ended quickly.

Not, of course, that any of this deterred defense counsel. He put Guardi on the stand next and, among other things, elicited, before an objection could be interposed, that Greenberg had been convicted of "a lot" of crimes (116).* In summation, most of defense counsel's argument was devoted to an attack on Greenberg's character (164-171). Nor did Judge Weinfeld's ruling prevent defense counsel from arguing Greenberg's criminal record to the jury and even insinuating a little of the evidence that Judge Weinfeld had excluded:

> "Now, you have heard that Marsha was convicted of crime. The extent of it has been precluded. She has been convicted of crime and that's all I can say about it. She has stolen over $60,000, but that is all I am permitted to say about it. Okay. That's the way that is.
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> * * * * *
>
> Marsha sat up there in all the cool confidence of the person who has the protection and the ear of the federal government and she has that ear and that protection because she has done her job and she has to produce and she has to produce her job here in Court as well. The job doesn't end merely by having somebody arrested, you have to come in and testify as well. So when I ask her about lesbian activities and she says no, but you know she has been convicted of crime, you know she has done time in jail but you don't know how long she has spent in a women's prison, okay, she is not going to say, 'Yes, I solicited your client for lesbian purposes and then when I was rebuked by her I decided she was fair game to set up, also'" (168, 176).

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* Guardi also testified, in direct contradiction of Greenberg, that Greenberg had made lesbian overtures to her and had threatened her into delivering Greenberg's narcotics to Mahone.

Turning now to the merits of Guardi's claim, we submit that it is virtually unnecessary to respond to the legal arguments made in Guardi's brief about the District Court's purportedly improper restriction of impeachment by prior convictions of the testimony of a hostile defense witness. For regardless of the correctness of the trial judge's ruling, Guardi received all that she was entitled to even as her version of the law. Even if Greenberg had been called as a government witness, Judge Weinfeld would still have had broad discretion to limit the nature and scope of her examination. *United States* v. *Kahn*, 472 F.2d 272, 281 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973); *United States* v. *Jenkins*, Dkt. No. 74-2257 (2d Cir., February 10, 1975) slip op. at 1770-1771; *United States* v. *Sperling*, 506 F.2d 1323, 1332 (2d Cir. 1974). This discretion extends to restriction on the use of prior convictions for impeachment. *United States* v. *DiLorenzo*, 429 F.2d 216, 220 (2d Cir. 1970), *cert. denied*, 402 U.S. 950 (1971). The most recent conviction which Guardi sought to use for impeachment was eighteen years old and was thus, as were Greenberg's still older convictions, excludable in the trial judge's discretion. See *United States* v. *Puco*, 453 F.2d 539, 543 (2d Cir. 1971); *United States* v. *DiLorenzo*, *supra*.* Moreover,

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* Because of Guardi's repeated complaint that the "yellow sheet" she requested was incomplete, we have, in connection with preparation of this brief, sent for the F.B.I. fingerprint report. It does disclose two more recent convictions than those shown on the New York City Police Department "yellow sheet": one in Pennsylvania in 1958 for larceny by trick and one in New Jersey in 1961 for grand larceny. Thus, contrary to what was presented to the trial judge, Greenberg's most recent conviction was not eighteen years old but thirteen years old.

In view of the record at the trial we submit that this shading in the age of Greenberg's most recent conviction is of little significance. Nor is Guardi entitled to complain about any deficiencies in the "yellow sheet" furnished. The Government did not intend to call Greenberg, and the defendant indicated for the first time her desire to do so and to be supplied with

[Footnote continued on following page]

more than enough about Greenberg's prior criminal history got before the jury for it to appraise Greenberg's credibility in light of her record. See *United States* v. *Blackwood*, 456 F.2d 526, 530 (2d Cir.), *cert. denied*, 409 U.S. 863 (1972). Defense counsel announced in his opening that Greenberg had been a "con artist" and spent a great deal of time in the penitentiary because of it. He also, one way or another, brought out that Greenberg had a criminal record, that she had in her lifetime swindled people out of more than $60,000 and that she had been convicted of a lot of crimes. Moreover, as noted in more detail above, defense counsel was permitted to roam at will over Greenberg's motivations for becoming an informant, the number of people she had "set up", her sex life and sexual desires, the trouble that Stewart and her son were in, and her threats against Guardi, to name a few. In short, we submit that the impeachment of Greenberg permitted by Judge Weinfeld was more than reasonable and within his discretion, even assuming that the law permitted Guardi to call Greenberg as a witness and impeach her however he wished.

The fact remains, however, that Guardi, on the record here, was not entitled to impeach Greenberg with her prior criminal record, having called her as a witness for the defense.

Guardi is certainly correct that the long established rule that a party may not impeach his own witness, IIIA Wigmore, Evidence §§ 896 *et seq.* (Chadbourn rev. 1970),

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the "yellow sheet" on the morning of trial (2). The Government furnished both Greenberg and the "yellow sheet", precisely what had been requested, in less than 24 hours. While it is regrettable that the yellow sheet did not have all of the entries that appear on the Federal Bureau of Investigation report, the trial Assistant United States Attorney had no way of knowing that such would be the case, quite apart from the inherent difficulties of obtaining the F.B.I. report from Washington overnight.

has been substantially eroded. It is settled in this Circuit that a witness who testifies in a manner inconsistent to his prior statement may be impeached with the prior statement by the party calling him and that the prior statement may be received for its truth if given in a prior judicial or Grand Jury proceeding under oath. *E.g.*, *United States* v. *Burket*, 480 F.2d 568, 572 (2d Cir. 1973); *United States* v. *Klein*, 488 F.2d 481 (2d Cir. 1973); *United States* v. *Cunningham*, 446 F.2d 194, 197 (2d Cir.), *cert. denied*, 404 U.S. 950 (1971); *United States* v. *Insana*, 423 F.2d 1165 (2d Cir.), *cert. denied*, 400 U.S. 841 (1970). It is also clear that a party calling a witness so identified with the party-opponent as to make him adverse to the party calling him may impeach that witness without any showing that the witness is hostile. *United States* v. *Freeman*, 302 F.2d 347, 351 (2d Cir. 1962), *cert. denied*, 375 U.S. 958 (1963).

However, even under the liberal view taken in this Circuit of impeachment of a witness by the party calling him, there is still a requirement that the party calling the witness be "surprised" by the testimony. See, generally, McCormick, Evidence § 38 at 76 (Cleary ed. 1972). This showing of surprise need only be "modest", *United States* v. *Kahaner*, 317 F.2d 459, 474 (2d Cir.), *cert. denied*, 375 U.S. 835 (1963), and may be made out merely by a deviation from a prior statement by the witness on the subject matter of his testimony, even if the prospect of this deviation is known to the party calling him before he takes the stand, *United States* v. *Burket*, *supra*, 480 F.2d at 571-572. However, Guardi cites no authority in this Circuit which permits the calling and impeachment by a party of a witness whose prior statements, including Grand Jury testimony, are known to him before the witness testifies to be consistently contrary to what he seeks to elicit and when he, as defense counsel did here, refuses to interview the witness before calling him. Indeed, the contention raised by Guardi—in a case remarkably similar

on its facts to this one—was rejected as properly disposed of by the trial court in its discretion in *Worthy* v. *United States*, 352 F.2d 718, 719-720 (D.C. Cir. 1965), *vacated and remanded on other grounds*, 384 U.S. 894 (1966). *But cf. United States* v. *Torres*, 477 F.2d 922 (9th Cir. 1973).

Moreover, whatever the relaxation of the rule against impeachment of one's own witness wrought by *Freeman* and like cases, it still appears to be generally settled that it is impermissible to call a witness who has consistently asserted the opposite of what the party calling him seeks to prove and then, having elicited such testimony, to impeach the witness by evidence of prior convictions. See IIIA Wigmore, Evidence § 900 (Chadbourn rev. 1970). The cases in this Circuit which permit the impeachment of a witness by the party calling him allow the use of leading questions and prior inconsistent statements for this purpose. No case in this Circuit appears to authorize a party to call a witness, whose previous statements and testimony have been consistently contrary to what he seeks to elicit, solely for the purpose of laying before the jury the prior criminal record of the witness, as Judge Weinfeld found to be defense counsel's purpose here. The attempt to prove facts by calling those known to assert the contrary to make them out as criminals and sexual misfits seems unlikely to advance the search for truth which is at the heart of the trial process, a view which clearly underlay the rulings below of one of the most distinguished and experienced trial judges in this Circuit. Whether allowance of such a trial stratagem would in the long run be more useful strategically to defendants than the Government is conjectural. However, we submit that such a technique is a perversion of the reforms in archaic procedures for which *Freeman* stands. The holding to the contrary in the Ninth Circuit in *United States* v. *Torres*, *supra*, has apparently never been followed and should not be followed here.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
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HARRY C. BATCHELDER, JR.,
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★ U. S. Government Printing Office 1975— 214—211—470

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

HARRY C. BATCHELDER JR. being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 25th day of FEBRUARY 1974 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

STEVEN D. SLEPIAN ESQ.
401 BROADWAY, Suite 1911
NEW YORK, NEW YORK 10013

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Harry C. Batchelder Jr.

Sworn to before me this
25th day of February, 1975

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1975